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No. 91-661

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CALIFORNIA SAND AND GRAVEL, INC.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of the Army properly revoked a contract with petitioner for the removal of sediment from the Hansen Dam.

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Engineer Pamphlet 405-1-2, § IV 2

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 2a-5a, is unreported, but is noted at 937 F.2d 624 (Table). The opinion of the Claims Court, Pet. App. 6a-51a, is reported at 22 Cl. Ct. 19.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1991. The petition for a writ of certiorari was filed on September 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1941, the Army Corps of Engineers constructed the Hansen Dam in order to control the flood waters of the Los Angeles basin. On March 26, 1982, the Los Angeles District of the Corps of Engineers issued an excavation license to petitioner California Sand and Gravel, Inc., for the removal of sediment at the Hansen Dam.[1] In accordance with the so-called granting clause, the license was issued for a period of one year commencing on March 29, 1982, and was renewable on a year-to-year basis for an additional four year term, ending on March 28, 1987. Condition 12 of the license restated the granting provision above, and added the provision that the license was renewable subject to satisfactory performance by the licensee. Pet. App. 7a-9a. Condition 30 provided that the Corps of Engineers reserved the right to revoke the license after giving 30 days notice to the licensee. *Id.* at 3a.

Pursuant to Army regulations and the delegation of authority by the Secretary of the Army, Colonel Paul Taylor, the District Engineer, and William Cheadle, the District Chief of Real Estate, were the only officers with the contracting authority to approve, execute, renew, modify, revoke, or terminate petitioner's license at the Hansen Dam. Pet. App. 9a-10a. The Corps of Engineers' internal guidelines, contained in Engineer Pamphlet 405-1-2, § IV, also require "sufficient justification" for terminating a license, including "a reasonable need for the property by the United States." Pet. App. 4a.

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[1] The Corps also issued three other licenses for the excavation and sale of sand and gravel from the dam. Each licensee had a designated area for excavation and a processing plant.

After the license agreement was executed, John King approached certain unidentified Corps of Engineers employees to discuss his desire to purchase petitioner California Sand and Gravel. During those discussions, according to King, he inquired about the status of petitioner's license and said that he wished to discuss certain of its provisions. Pet. App. 10a-11a. According to King, certain unidentified Corps employees informed King that under Condition 30 of the license with petitioner, the Corps would only cancel the license in the event of a flood or other natural disaster and that the Corps would renew the license automatically without reapplication each year for four years. *Id.* at 10a-12a. King thereafter purchased petitioner California Sand.[2]

b. In the fall of 1983,[3] Colonel Paul Taylor, Corps District Engineer, determined that it would be in the public interest to terminate the existing excavation licenses for the Hansen Dam and, instead, to solicit competitive proposals to have only one licensee to remove all the sediment.[4] Late in 1983, the Corps of

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[2] In this action, petition alleged that the foregoing representations were binding oral modifications to the license agreement. Pet. App. 12a.

[3] In early 1982, dissension developed between the Corps of Engineers and another licensee, Paul Hurns, who allegedly had removed sediment and silt from outside his license area.

[4] Colonel Taylor explained, Pet. App. 3a:

> While relatively small amounts of sand and gravel were being removed by three of these licensees, the silt remained . . . [and] I, as the District Engineer, determined that it would be in the public interest to again solicit proposals from the industry to remove silt as well as sand and gravel from the Hansen Dam Flood Control Basin. A large operation was contemplated which would also more quickly help restore the flood control capacity to the basin.

Engineers told petitioner that the Corps would issue a request for proposals to have one contractor remove sediment from the dam. Petitioner did not submit a bid in response to that request. Additionally, petitioner alleges, Land, the Corps of Engineers District Chief of Operations, said that if petitioner did not become a subcontractor for the firm that was the successful bidder (Channel Basin and Reclamation), petitioner could move its operation to the Santa Fe Dam. Pet. App. 14a.

April 9, 1984, the Corps of Engineers executed a five year license with Channel Basin and Reclamation to remove sediment at the Hansen Dam. The next day, the Corps of Engineers notified petitioner that its license would be terminated "30 days from receipt of this notification but no later than May 15, 1984." By letter dated May 9, 1984, petitioner acknowledged receipt of the Corps of Engineers' April 10, 1984, letter and informed the Corps that it would vacate the premises May 15, 1984. Subsequently, petitioner was not chosen to remove sediment at the Sante Fe Dam. Pet. App. 15a-16a.

2. Petitioner thereafter brought this action in the Claims Court against the United States, seeking damages for the alleged breach of the license. On the government's motion for summary judgment,[5] the court dismissed petitioner's complaint and entered judgment in the government's favor.

The court held that the license agreement was fully integrated and that petitioner therefore could not rely on parol evidence to modify the terms of the license. Pet. App. 30a. The court further held that any state-

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[5] Because the parties included matters outside the pleadings in their motion papers, the court treated the government's motion to dismiss as one for summary judgment.

ments or actions by Land, the Corps' District Chief of Operations, could not modify the license, because Land did not have authority to bind the government in this regard. *Id.* at 31a-33a. The court also rejected petitioner's claim that Land's superiors subsequently ratified Land's actions. *Id.* at 38a-40a. The court also held that Condition 30 of the license permitted the government to cancel the license either (1) upon 30 days notice or (2) for flood control purposes. *Id.* at 42a. Finally, the court concluded that the April 10, 1984, termination satisfied the notice requirements of Condition 30. *Id.* at 49a-50a.

6. The court of appeals affirmed in an unpublished order. Pet. App. 2a. The court held that Condition 30 allowed the Corps of Engineers to terminate the license after giving petitioner 30 days notice and that the April 10, 1984, letter satisfied that requirement. The court also determined that even if Condition 30 permitted cancellation of the license only for "flood control" purposes, the unrebutted declaration of Colonel Taylor demonstrated that the license had been terminated for such a purpose. *Id.* at 3a. Finally, relying on the same declaration, the court found that the Corps satisfied its internal guideline requiring "sufficient justification" to terminate the license.

ARGUMENT

This case involves the interpretation of two sentences in one provision of a contract. Petitioner does not allege, nor are we aware of, any conflict among the circuits on the meaning of those sentences. Moreover, the decision below is correct. Accordingly, review by this Court is not warranted.

The court of appeals correctly held that Condition 30 empowered the Army to cancel petitioner's license after giving petitioner 30 days notice. Pet. App. 3a. Condition 30 states that "the license may be revoked or cancelled at any time when required for flood control purposes. The Corps of Engineers shall reserve the right to revoke th[i]s license on 30 days notice." *Id.* at 9a. Each sentence in Condition 30 is separate and distinct from the other and authorized the Corps to revoke petitioner's license in different ways.

Petitioner contends that Condition 30 permits the Corps to terminate the license upon 30 days notice only if necessary for flood control purposes. Pet. 29-30. That interpretation of the condition, however, would require the Corps of Engineers to give a licensee 30 days notice before evacuating the dam in the face of an imminent flood. Because petitioner's reading of the license is unreasonable, the courts below properly declined to accept it.

After determining that Condition 30 permitted the termination of the license upon 30 days notice, the court of appeals went on to address petitioner's claim that Condition 30 only permitted the license to be terminated for flood control purposes. In addressing that contention, the court found that if any such requirement were necessary, the Corps satisfied it in this case, because Colonel Taylor's sworn and unrefuted declaration revealed that the Corps cancelled all

existing licenses in order to use only one excavator instead. Pet. App. 3a. Petitioner maintains that the court of appeals erred in so ruling because the record before the Claims Court did not justify the conclusion that there was no disputed question of material fact about whether the government had cause to terminate petitioner's license. Pet. 19-40. That argument is misdirected. The issue that the court of appeals discussed was not whether the government had cause to terminate petitioner's license, but was whether the reason for the termination was related to flood control. Colonel Taylor's declaration established that relationship, and petitioner has not cited any record material refuting the colonel's statement.

Petitioner contends that the court of appeals erred because the "cause" cited by the court of appeals for the cancellaiton was unsatisfactory performance by other firms and because, according to petitioner, the government cannot justify breaching its contract with petitioner on the ground that others acted unsatisfactorily. Pet. 40-41. Petitioner, however, has misread the opinion below. The court of appeals simply noted that the sworn declaration of Colonel Taylor provided the "sufficient justification" to terminate existing licensees for a "flood control" purpose. Even assuming that petitioner had performed satisfactorily under the terms of the license (a point that we do not concede), the sworn declaration of Colonel Taylor clearly states that it was in the public interest to terminate *all* of the licenses in the dam and solicit competitive proposals from the industry for a single contractor to remove all sediment from the dam. The Corps is not obligated to use several licensees simply because one or two of them were performing satisfactorily if the Corps could reasonably have believed

that flood control conditions justify the use of a single large contractor.[6]

Finally, petitioner argues that the court of appeals ignored its claim that the termination was ineffective because bankruptcy proceedings were pending and the automatic stay provisions were never lifted. Petitioner acknowledges, however, that the "*actual* entity which filed [bankruptcy] * * * was Illinois-California Sand and Gravel, Inc.", Pet. 42 n.3 (emphasis added) —not petitioner California Sand and Gravel. Petitioner's automatic stay argument therefore lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

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[6] Petitioner alleges that the license was never effectively terminated because the "only notice of termination" ever given was the notice that referenced Amendment 5, which petitioner claims never to have received or signed. The court of appeals, however, correctly found that the April 10, 1984, termination letter sent by Cheadle gave petitioner notice of the termination. Pet. App. 3a. Petitioner expressly acknowledged receipt of that notice of termination by letter dated May 9, 1984. *Id.* at 16a.

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